9

TRANSCRIPT OF RECORD.

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1913.

No. 79.

THE UNITED STATES OF AMERICA *EX RELATIONE* A. GOLDBERG, PLAINTIFF IN ERROR,

vs.

JOSEPHUS DANIELS, SECRETARY OF THE NAVY.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

FILED AUGUST 4, 1911.

(22,830)

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In the Court of Appeals of the District of Columbia.

No. 2284.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG, Appellant,
vs.
GEORGE VON L. MEYER.

a Supreme Court of the District of Columbia.

At Law. No. 53313.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG
vs.
GEORGE VON L. MEYER, Secretary of the Navy.

UNITED STATES OF AMERICA,
District of Columbia, ss:

Be it remembered, that in the Supreme Court of the District of Columbia, at the City of Washington, in said District, at the times hereinafter mentioned, the following papers were filed and proceedings had in the above-entitled cause, to wit:

1 *Petition for Writ of Mandamus.*

Filed February 8, 1911.

In the Supreme Court of the District of Columbia.

At Law. No. 53313.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG
vs.
GEORGE VON L. MEYER, Secretary of the Navy.

To the Honorable the Justices of the Supreme Court of the District of Columbia:

The petition of A. Goldberg respectfully represents:

1. That he is a citizen of the United States, though now residing in Vancouver, British Columbia, and that George von L. Meyer, the

defendant herein, is the Secretary of the Navy of the United States and is temporarily residing in the District of Columbia.

2. That under the terms and provisions of an Act of Congress approved August 5, 1882, Chapter 391, Section 2, (22 Stat. L. 296) the United States cruiser Boston was, after survey, condemnation and appraisal, stricken from the Naval Register, and that subsequent thereto the respondent, as Secretary of the Navy, pursuant to the provisions of Section 5 of the Act of Congress approved March 3, 1883, (22 Stat. L. 599) advertised for proposals for the purchase of
2 said vessel the Boston, to be sold to the person offering the highest price therefor over and above her said appraised value, which appraised value was the sum of thirteen thousand dollars.

3. The terms of said 5th Section of the Act of March 3, 1883, are as follows:

"It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August 5, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less
3 than ten per centum of the amount of the offer or proposal, and also a bond, with two or more sureties to be approved by him, conditioned for the payment of the remaining ninety per centum of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per centum, or any part thereof, the Secretary, within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the government, and shall be applied, first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel; and the balance, if any, shall be covered into the Treasury: Provided, however, That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into

the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing. In case any vessel now in process of construction in any navy yard has been or shall be found to be unworthy of being completed, and has been and shall be condemned under the provisions of said act, and cannot properly be sold, and it becomes necessary to remove the same, the cost of such removal shall be paid out of the net proceeds derived from the sale of other vessels hereby authorized to be sold."

4. Your petitioner further shows that the public advertisement asking for bids for said cruiser Boston was as follows:

"Proposals.—Sale of U. S. vessels Boston and Concord.—Sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened, for the purchase of the Boston, appraised value $13,000, and the Concord, appraised value $43,000. Forms of proposal and bond, and information concerning the vessels and the terms and conditions of sale, may be obtained on application to the Department. The vessels may be examined at the Navy Yard, Puget Sound, Wash. R. F. Nicholson, Acting Secretary of the Navy. 10-22-10."

5. And that upon seeing this advertisement your petitioner applied to the proper authorities for the forms of proposal and bond and information concerning the said vessel and the terms and conditions of sale, and was furnished by the Department with the printed slip which is appended hereto as part hereof, and which, upon said application, he received from the Navy Department for the purpose of becoming a bidder for said vessel and complying with all the terms and conditions imposed by said Secretary of the Navy upon prospective bidders for said cruiser.

6. That upon being furnished with these particulars your petitioner submitted his bid of twenty thousand dollars for the cruiser Boston and accompanied his bid with a certified check for the full amount thereof.

7. That at twelve o'clock noon December 7, 1910, being the day mentioned in the advertisement, the bids for said cruiser were opened, and it was ascertained that your petitioner's bid was the highest bid for said cruiser Boston.

8. Your petitioner alleges that the papers on file in the Department of the Navy show, and he alleges the fact to be, that your petitioner had complied with and conformed to all the terms and conditions imposed upon him and other bidders for said cruiser Boston by the Department, and that when it was ascertained that he was the highest bidder it became and was the duty of said George von L. Meyer, Secretary of the Navy, to deliver said cruiser Boston to your petitioner, and that said duty so to deliver said cruiser was one purely ministerial in its character and neither requiring or permitting the exercise of any discretion by said George von L. Meyer, Secretary of the Navy.

9. But your petitioner alleges the fact to be that he has been

notified by said George von L. Meyer, Secretary of the Navy, that he will not deliver said cruiser Boston to your petitioner, but
6 intends to loan her to the Governor of the State of Oregon.

10. And your petitioner further shows that some time in the early part of January, A. D. 1911, said Secretary of the Navy, George von L. Meyer, notified your petitioner by telegraph that he had determined not to deliver said cruiser Boston to him and that he was returning to petitioner his said certified check for twenty thousand dollars, whereupon your petitioner notified said George von L. Meyer, Secretary of the Navy, that he would not accept or receive said check, but demanded the delivery of said cruiser Boston to him.

11. And your petitioner further shows that, notwithstanding his notification to said George von L. Meyer, Secretary of the Navy, of his intention to refuse to accept his said check, the said George von L. Meyer did return the same to your petitioner, who now holds it subject to the order, instructions or disposition of said George von L. Meyer, Secretary as aforesaid.

12. And your petitioner tenders himself ready and willing to produce and surrender said identical certified check to said George von L. Meyer, Secretary of the Navy, at any time.

13. And your petitioner claims that he is the true owner and entitled to immediate delivery of the possession of said cruiser Boston to him.

14. And your petitioner is advised that he is remediless in
7 the premises to obtain the delivery of the possession of said cruiser Boston by said George von L. Meyer, Secretary of the Navy as aforesaid, except by the aid and assistance of this Honorable Court through the issue by it of the writ of mandamus compelling said George von L. Meyer, Secretary of the Navy, to deliver the possession of said cruiser Boston to your petitioner or to show cause, if any he has, why said writ should not be issued.

Wherefore, the premises considered, your petitioner prays:

1. That a writ of mandamus may be issued and directed to said George von L. Meyer, Secretary of the Navy, commanding him to deliver said cruiser Boston to your petitioner.

2. That a rule may be issued and served upon the said George von L. Meyer requiring him to appear upon some certain day in said rule to be named and show cause why the prayer of this petition for the delivery of the possession of the said cruiser Boston to your petitioner should not be granted.

3. For such other and further relief as your petitioner's case may require.

A. GOLDBERG,
Petitioner.
By CHAS. A. POE,
Attorney.

CHAS. POE,
Attorney for A. Goldberg.

DISTRICT OF COLUMBIA, *ss:*

Before the subscriber, Francis L. Neubeck, a notary public
8 in and for the District of Columbia, personally appeared Charles Poe, who made oath that he is the attorney for the within petitioner and is authorized by him to institute these proceedings; that he has read the foregoing petition by him subscribed, and that the facts as set forth in said petition are true to the best of his knowledge and belief.

CHARLES POE,
Attorney for Petitioner.

Subscribed and sworn to before me this 8th day of February, 1911.

[SEAL.] FRANCIS L. NEUBECK,
Notary Public.

9 *General Information Concerning the United States Vessels Boston and Concord, Offered for Sale under the Provisions of the Act of Congress Approved March 3, 1883.*

In accordance with the provisions of section 5 of the act of Congress approved March 3, 1883, sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened, for the purchase of the United States vessels Boston and Concord, now lying at the Navy Yard, Puget Sound, Wash., these vessels having been stricken from the Navy Register, after survey, condemnation, and appraisal, under authority of the act of August 5, 1882.

As appraised by a board of survey and appraisal, the value of the Boston, as she lies, with certain articles of equipage and outfit suitable for further use by the Government removed, but with her boilers, main engines, dynamo engines, miscellaneous auxiliary machinery, spars, masts, standing rigging, boat davits, stanchions, deck winches, steering gear, main ventilating fans, and one anchor and a sufficient amount of chain for mooring purposes left on board, is $13,000. The value of the Concord as she lies, with her masts, booms, stanchions, davits, anchors and chains, fixed furniture, auxiliary machinery, main engines, boilers, electrical and mechanical communication instruments, plumbing and a part of the portable furniture left on her, is appraised by the board at $43,000.

The Boston is an unarmored steel protected cruiser, with two-masted schooner rig and two funnels. She was built by John Roach & Sons at Chester, Pa., and was launched December 4, 1884. Length over all, 288 feet 3 inches; beam, extreme, 42 feet 2 inches; mean draft, 16 feet 10 inches; normal displacement, 3,000 tons; horizontal compound engines; eight single-ended Scotch boilers; trial speed, 15.60 knots; bunker capacity, 428 tons.

The Concord is an unarmored steel gunboat, with two-masted schooner rig, and one funnel. She was built by N. F. Palmer, Jr., & Co., at Chester, Pa., and was launched March 8, 1890. Length

between perpendiculars, 230 feet; length over all, 244 feet 5 inches; breadth on load water line, 36 feet; mean draft, 14 feet; normal displacement, 1,710 tons; twin-screw horizontal triple expansion engines; eight straight-away cylindrical boilers; trial speed, 16.80 knots; I. H. P. of propelling machinery and its auxiliaries on trial, 3,359; bunker capacity, 354 tons.

These vessels will be sold for cash to the bidders offering the highest prices above the appraised values.

Separate proposals for each vessel must be submitted in a sealed envelope, addressed to the Secretary of the Navy, Washington, D. C., and endorsed "Proposal for the purchase of the U. S. S. ——" (insert name of vessel for which offer is made), so as to distinguish it from other communications and prevent the opening thereof before the time fixed by the Department's advertisement of October 22, 1910.

Each proposal must be accompanied by a deposit in cash (or satisfactory certified check) of not less than 10 per cent of the amount of the offer or proposal, and also a bond in a penal sum equal to the whole amount of the offer, with two or more individual sureties, or with a corporate surety authorized to do business under the act of August 13, 1894, as amended by the act of March 23, 1910, to be approved by the Secretary of the Navy, conditioned for the payment of the remaining 90 per cent of the amount of such offer or proposal within thirty days from the date of its acceptance. In case default is made in the payment of the remaining 90 per cent or any part thereof within that time, said cash deposit (or check) of 10 per cent shall be considered as forfeited to the Government, and shall be applied as directed in the act of March 3, 1883.

Where a cash deposit or certified check covering the amount offered accompanies the proposal no bond need be furnished. Tie bids will be decided by the Secretary of the Navy by lot. All deposits by bidders whose proposals shall not be accepted will be returned to them within seven days after the opening of the proposals.

The vessels may be examined upon applying to the commandant of the Navy Yard, Puget Sound, Wash. They must be removed from the limits of the yard by the purchasers at their own expense within such reasonable time as may be fixed by the Department.

The Department will not be responsible for errors or inaccuracies in the foregoing descriptions, as the vessels can be examined by parties interested, or for articles on board after the sale.

R. F. NICHOLSON,
Acting Secretary of the Navy.

Navy Department, Washington D. C., October 22, 1910.

Proposals.—Sale of U. S. vessels Boston and Concord.—Sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened, for the purchase of the Boston, appraised value $13,000, and the Concord, appraised value $43,000. Forms of proposal and bond, and information concerning the vessels and the terms and conditions of sale, may be obtained on application to the Department. The vessels may be

examined at the Navy Yard, Puget Sound, Wash. R. F. Nicholson, Acting Secretary of the Navy. 10-22-10.

11 *Rule to Show Cause.*

Filed February 8, 1911.

* * * * * * *

Upon consideration of the petition of A. Goldberg, filed herein this 8th day of February, 1911, it is by the Court this 8th day of February, 1911, ordered that the respondent, George von L. Meyer, Secretary of the Navy, show cause, if any he has, on or before the 17th day of February, 1911, at 10 o'clock A. M., why a writ of mandamus should not be issued as prayed in said petition, provided a copy of said petition and this rule be served upon said respondent, Secretary of the Navy, on or before the 10th day of February, 1911.

THOS. H. ANDERSON, *Justice.*

Marshal's Return.

Served copy of within rule, together with copy of petition in this cause, on George von L. Meyer, Secretary of the Navy, by service on Beekman Winthrop, Acting Secretary.

Feb'y 8, 1911.

AULICK PALMER, *Marshal.*

8.

Answer.

Filed February 16, 1911.

* * * * * * *

Beekman Winthrop, Acting Secretary of the Navy, now, and at all times hereafter, saving and reserving unto the defendant all of, and exceptions to, the imperfections, uncertainties and defects of the petition for a writ of mandamus filed herein, and reserving to de-

12 fendant the benefit of the lack of jurisdiction of this Court, appearing on the face of said petition, to grant the relief prayed for, and the lack of jurisdiction of this Court to direct the Secretary of the Navy, to compel him, as individual or as Secretary, to perform any act involving the exercise of his judgment and discretion in matters within his jurisdiction, or in relation to the property of the United States, and relying on the same, as if demurrer had been specifically interposed, for answer unto said petition, or as much thereof as is material, and to said rule to show cause, answering, says:

1. He admits that the defendant, George von L. Meyer, is Secretary of the Navy of the United States, and is temporarily residing in

the District of Columbia, but he has no personal knowledge of the citizenship of A. Goldberg, and therefore denies that the said petitioner is a citizen of the United States.

2. He admits that the United States Cruiser "Boston," was, after survey, condemnation and appraisal, stricken from the Navy Register, under the provisions of the Act of Congress, approved August 5, 1882, and he admits that, pursuant to the provisions of Section 5 of the Act of Congress approved March 3, 1883, advertisement was published for poposals for the purchase of the United States Cruiser "Boston," which said advertisement was promulgated by R. F. Nicholson, Acting Secretary of the Navy, and not by the Secretary of the Navy in person.

3 and 4. He admits the statements made in the third and fourth paragraphs of said petition.

5, 6, and 7. Answering the fifth, sixth, and seventh, paragraphs of said petition, this answerer is advised that allegations therein
13 contained are substantially correct.

8. Answering the eighth paragraph of said petition, this answerer says that it is true that the said petitioner complied with the terms and conditions imposed upon bidders for the cruiser "Boston" by the Navy Department, but denies that when it was ascertained that the petitioner was the highest bidder, it became the duty of the Secretary of the Navy, to deliver said cruiser "Boston" to said petitioner, and denies that said duty to deliver said cruiser was only purely ministerial in its character, and neither required nor permitted the exercise of any discretion by the defendant.

This answerer avers the fact to be that the invitation offered to the petitioner and others who might desire to bid for the purpose of purchasing the cruiser "Boston," was promulgated for the purpose of ascertaining at what price said vessel might be sold; that the bid of the petitioner herein was an offer on behalf of the said petitioner to purchase said cruiser, which said offer has never been accepted by the Secretary of the Navy, nor by anyone else on his behalf, and avers that the said cruiser is now, and ever has been, since its commission as a vessel in the United States Navy, the property of the United States of America. And the Secretary of the Navy is vested, as such officer, and by virtue of Section 5 of the Act of March 3, 1883, with the discretionary power to determine whether it be for the best interests of the United States to sell said vessel, or any other vessel be-
longing to the United States, which said discretionary power
14 this answerer avers, in regard to said cruiser "Boston," to be and to remain in the Secretary of the Navy up to the present time, and has never been taken from him by the submission of the bid of the petitioner herein.

9. Answering the ninth paragraph of said petition, this answerer admits that the Department of the Navy has notified the petitioner that the Secretary will not deliver the said cruiser "Boston" to him, and avers that the Government of the United States has engaged to loan said cruiser "Boston" to the Governor of the State of Oregon, for the purpose of using said cruiser by the naval militia of said State.

10, 11 & 12. Answering the tenth, eleventh and twelfth paragraphs of said petition, this answerer admits that the Department of the Navy notified the petitioner that the Secretary of the Navy would not deliver said cruiser, "Boston," to said petitioner, and did return to the said petitioner the certified check for Twenty Thousand Dollars ($20,000.00).

Further answering the said paragraphs, this answerer avers that the said petitioner has received, and does still retain the said check, and that the Secretary of the Navy has no right, title or interest in the said check so returned to the petitioner, as the bid of the said petitioner, which said check accompanied, was never accepted by the Secretary of the Navy, or by anyone else acting for and on his behalf.

This answerer further avers that there is no duty or obligation
15 imposed upon the Secretary of the Navy, either by virtue of the said advertisement for proposals, or the statutes of the United States, to accept the highest, or any other bid, for naval vessels advertised to be sold, or for the cruiser, "Boston," and no bid of petitioner herein was ever accepted.

This answerer further shows that the matter of accepting or rejecting the said offer to purchase the cruiser, "Boston," as aforesaid, rested solely in the discretion of the Secretary of the Navy, and in the exercise of such discretion, the Secretary of the Navy rejected the bid of the petitioner, and all other bids, for the purchase of the cruiser, "Boston," and the Navy Department so notified the petitioner by telegram on the seventeenth day of December, 1910. He further says that the Secretary of the Navy does not nor does anyone for him, hold the certified check for Twenty Thousand Dollars ($20,000.00), referred to in said petition, nor any other amount received from the petitioner herein for the purchase of the cruiser, "Boston," and that said petitioner was not in a position, at the time of the institution of these proceedings, to demand the relief prayed for by said petition.

13. Answering the thirteenth paragraph of said petition, this answerer denies that the petitioner is the true owner, and entitled to the immediate delivery of said cruiser, "Boston," to him, and avers that the said cruiser, "Boston," is now, and at all times has been, the property of the United States, and is not subject to any claim, right, title or interest of the said petitioner.

16 14. Answering the fourteenth paragraph of said petition, this answerer avers that the same contains mere conclusions of law which the Secretary of the Navy is not called upon to answer.

This answerer, however, without admitting the contention of the petitioner, avers that, if the claim of the petitioner is correct, that said petitioner has a binding contract with the Department of the Navy to purchase said cruiser, "Boston," said petitioner has a full, ample and complete remedy against the United States in the Court of Claims, or by other action at law against the persons alleged to be wrongfully withholding said ship.

Wherefore, answerer respectfully submits that this Honorable Court is without jurisdiction over the defendant in the premises, as it appears in and by the said petition that the defendant is sued as an officer of the Government of the United States, and concerning mat-

ters arising out of, and within his duty as such public officer, and relating to matters within his judgment and discretion. And it further appears from the said petition that the petitioner has no right, title or interest in the subject matter of the controversy which would entitle him to a writ of mandamus or any relief whatsoever.

Wherefore, having fully answered as many of the averments in said petition as he is called upon to answer, this answerer prays that the rule to show cause issued herein be discharged, and the
17 defendant be hence dismissed, with reasonable costs.

BEEKMAN WINTHROP,
Acting Secretary of the Navy of the United States of America.

CLARENCE R. WILSON,
Attorney of the United States in and for the District of Columbia.

REGINALD S. HUDEKOPER,
Assistant Attorney of the United States in and for the District of Columbia.

DISTRICT OF COLUMBIA, *ss:*

I, Beekman Winthrop, being first duly sworn, upon oath depose and say that I am Acting Secretary of the Navy of the United States of America; that I have read the foregoing answer by me subscribed, and know the contents thereof; that the matters and facts therein stated of my own knowledge are true, and those stated upon information and belief I believe to be true.

BEEKMAN WINTHROP.

Subscribed and sworn to before me this 15th day of February, A. D. 1911.

[SEAL.]

PICKENS NEAGLE,
Notary Public.

18 *Demurrer to Answer.*

Filed February 16, 1911.

* * * * * * *

Now comes the petitioner, A. Goldberg, by Charles Poe, his attorney, and, as to the answer of the defendant to the rule to show cause herein, says that the same is bad in substance.

CHAS. POE,
Attorney for Petitioner.

Memorandum.

Among the questions of law intended to be raised by the above demurrer are the following:

1. Was there a contract between the said petitioner and the said defendant?

2. Was the action sought to be commanded to be performed, to wit, the delivery of the Cruiser Boston by the defendant to the petitioner, one discretionary or purely ministerial in its character?

CHAS. POE,
Attorney for Petitioner.

19 Supreme Court of the District of Columbia.

FRIDAY, *March* 10, 1911.

Session resumed pursuant to adjournment, Mr. Justice Anderson presiding.

* * * * * * *

Upon consideration of the petitioner's demurrer to the respondent's answer to the rule to show cause herein, it is ordered that said demurrer be, and it is hereby overruled; whereupon the petitioner by his Attorney now in open Court says that he will stand upon his demurrer.

Therefore, it is considered that the rule to show cause herein be, and the same is hereby discharged, the petition dismissed, and that the Respondent recover against the Petitioner, the costs of his defense, to be taxed by the Clerk, and have execution thereof.

From the foregoing the Petitioner by his Attorney in open Court, notes an appeal to the Court of Appeals of the District of Columbia, and the penalty of the bond for costs on said appeal is hereby fixed in the sum of One hundred dollars ($100).

Memorandum.

March 24, 1911.—Appeal bond approved and filed.

20 *Opinion of Court.*

Filed March 28, 1911.

* * * * * * *

The plaintiff is not entitled to a writ of mandamus to compel the Secretary of the Navy to deliver to him the Cruiser Boston, for several reasons:

(1) According to the answer of the Secretary to the rule to show cause the Secretary of the Navy never accepted the relator's bid, but on the contrary declined to accept it and so notified the relator, and therefore no contractual relation is shown to exist between the Secretary of the Navy and the relator.

(2) Under § 3744 R. S. U. S. all contracts with the Secretary of the Navy must be reduced to writing and signed by the parties, and it has been held that a proposal accepted by letter will not bind the United States (South Boston Iron Co. v. U. S. 118 U. S. 37. Clark v. U. S. 95 U. S. 539). Therefore it would seem to follow that even if

the Secretary of the Navy had notified the relator of his acceptance of such bid, such notice would not have been binding upon the United States for the reason that the title to the vessel is not in the Secretary of the Navy but in the United States, and until § 3744 R. S. U. S. has been complied with the relator could acquire no right to the vessel as against the United States.

(3) Even if the relator were entitled to the possession of
21 the vessel, he has an adequate remedy at law, and, having such remedy, he cannot resort to the extraordinary remedy of mandamus. He may take one of two courses (*a*) He may bring an action of replevin to recover the possession of the property from those having it in possession. (*b*) He may bring an action for damages in the Court of Claims.

By advertising this vessel for sale, the Government did not bind itself to actually sell the same. It simply invited offers to purchase the vessel upon the conditions named in the invitation, and the relator's bid was nothing more than an offer to buy. Under the Act of Aug. 5, 1882, the Secretary of the Navy was authorized, after condemnation and survey, to sell vessels of the United States "if the said Secretary shall deem it for the best interests of the United States to sell any such vessel," and he may very well have concluded, notwithstanding the offer of the plaintiff to buy this vessel at $20,000, that it was not for the best interests of the United States to sell the same, and hence refused to accept such bid. So that the statute in question authorizing the Secretary of the Navy to sell vessels stricken from the Navy Register and appraised does not compel the Secretary to make such sale. It is only when the Secretary shall deem it for the best interests of the United States to sell any such vessel or vessels that he is authorized to sell the same in the manner prescribed by the statute.

In Page on Contracts Vol. 1 § 33 and cases cited (among others Moffatt v. Rochester 178 U. S. 373), it is said:

22 "An offer may be withdrawn at any time before it has been accepted, and cannot after withdrawal be accepted so as to make a binding contract."

The same authority further says:

"Thus at an auction sale a bid may be withdrawn at any time before it is accepted. So the party offering the property for sale may withdraw it at any time before the bid has been accepted."

So that, under the admitted facts of this case, Mr. Goldberg has neither a contract to sell to him this vessel, nor a right to compel a contract to be entered into with him to sell a vessel to him. This being so, it was entirely in the discretion of the Secretary of the Navy to determine whether it was for the best interests of the United States to sell the vessel, and until he has accepted a bid and entered into a contract in writing with a bidder and the same has been duly signed by both parties as required by § 3744 R. S. U. S. his right to exercise such discretion still remains.

"Mandamus lies to compel the performance of a statutory duty only where it is clear and indisputable, and there is no other legal remedy." 127 U. S. 246, 250.

"To sustain mandamus, the party must have a perfect legal right, and there must be a positive ministerial duty to be performed and no other appropriate remedy." 2 Bouvier's Law Dictionary, 300.

So that in any view of this case the relator is not entitled to the writ for which he prays. It would have been entirely sufficient to have rested the disposition of this case upon the proposition first stated by the Court, namely, that, inasmuch as the Secretary of the Navy refused to accept the relator's bid there was no sale, and, there being no sale, no title or right or interest in the vessel
23 in question vested in the relator by reason of his bid.

For the reasons stated, the writ of mandamus prayed for in the relator's petition will be denied.

By the Court.

THOS. H. ANDERSON, *Justice.*

24 *Order for Transcript of Record on Appeal.*

Filed March 24, 1911.

* * * * * * *

The Clerk of said Court will include the following in making up the transcript of record on appeal in this cause. Feb. 8 petition, affidavit, exhibit, rule to show cause—Feb'y 16 answer to rule and demurrer thereto—Mar. 10 judg't, apeal in open Court order fixing bond for costs—Mar. 24 mem. approved appeal bond filed—This order.

CHARLES POE,
Attorney for Relator.

25 Supreme Court of the District of Columbia.

UNITED STATES OF AMERICA,
District of Columbia, ss:

I, John R. Young, Clerk of the Supreme Court of the District of Columbia, hereby certify the foregoing pages numbered from 1 to 24, both inclusive, to be a true and correct transcript of the record, according to directions of counsel herein filed, copy of which is made part of this transcript, in cause No. 53313 at Law, wherein The United States of America, ex relatione A. Goldberg, is Petitioner and George von L. Meyer, Secretary of the Navy, is Respondent, as the same remains upon the files and of record in said Court.

In testimony whereof, I hereunto subscribe my name and affix the seal of said Court, at the City of Washington, in said District, this 29th day of March, 1911.

[Seal Supreme Court of the District of Columbia.]

JOHN R. YOUNG, *Clerk.*

Endorsed on cover: District of Columbia Supreme Court. No. 2284. The United States of America ex relatione A. Goldberg, appellant, vs. George von L. Meyer. Court of Appeals, District of Columbia. Filed Apr. 7, 1911. Henry W. Hodges, clerk.

MONDAY, *May* 1*st*, A. D. 1911.

No. 2284.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG, Appellant,
vs.
GEORGE VON L. MEYER, Secretary of the Navy.

The argument in the above entitled cause was commenced by Mr. Charles Poe, attorney for the appellant, and was continued by Mr. R. S. Huidekoper, attorney for the appellee, and was concluded by Mr. Charles Poe, attorney for the appellant.

No. 2284.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG, Appellant,
v.
GEORGE VON L. MEYER, Secretary of the Navy.

Opinion.

Mr. Chief Justice SHEPARD delivered the opinion of the Court.

This is an appeal from a judgment dismissing a petition for a writ of mandamus.

The following facts are alleged in the petition: The United States Cruiser Boston, after survey, condemnation and appraisal, was stricken from the Naval Register in compliance with an act of Congress approved August 5, 1882 (22 Stat., 295). Said cruiser was then advertised for sale under the provisions of the act approved March 3, 1883 (22 Stat., 599). The public advertisement for proposals to purchase said cruiser announced that sealed proposals would be received at the Navy Department, until 12 o'clock noon, December 7, 1910, when they would be publicly opened, for the purchase of the Boston, appraised value $13,000; forms of proposal and bond, and information concerning the vessel, terms and conditions of sale to be obtained on application to the department; vessel may be examined at the Navy Yard, Puget Sound, Washington. Relator, seeing the advertisement, applied for and received from the department the necessary information aforesaid. A printed statement was furnished him on his said application. This, omitting some matters relating to the other ship, advertised at the same time, and some unimportant details, reads as follows:

"In accordance with the provisions of section five of the act of Congress approved March 3, 1883, sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened for the purchase of the United States vessels Boston and Concord, now lying at the Navy Yard, Puget Sound, Washington, these vessels having been stricken from the Navy Register, after survey, condemnation and appraisal, under authority of the act of August 5, 1882.

"As appraised by the board of survey and appraisal, the value of the Boston as she lies, with certain articles of equipage and outfit suitable for further use by the Government removed, but with her boilers, main engines, dynamo engines, miscellaneous auxiliary machinery, spars, masts, standing rigging, boat davits, stanchions, deck winches, steering gear, main ventilating fans, and one anchor, and a sufficient amount of chain for mooring purposes left on board, is $13,000. * * *

"These vessels will be sold for cash to the bidders offering the highest prices above the appraised values.

"Separate proposals for each vessel must be submitted in a sealed envelope, addressed to the Secretary of the Navy, Washington, D. C., and endorsed 'Proposal for the purchase of the U. S. S. ——.' (Insert the name of vessel for which offer is made, so as to distinguish it from other communications and prevent the opening thereof before the time fixed by the department's advertisement of October 22nd, 1910.)

"Each proposal must be accompanied by a deposit in cash (or satisfactory certified check) of not less than 10% of the amount of the offer or proposal, and also a bond in a penal sum equal to the whole amount of the offer, with two or more individual sureties or with a corporate surety authorized to do business under the act of August 13, 1894, as amended by the act of March 23, 1910, to be approved by the Secretary of the Navy, conditioned for payment of the remaining 90% of the amount of such offer or proposal within thirty days from the date of its acceptance. In case default is made in the payment of the remaining 90%, or any part thereof within that time, said cash deposit (or check) of 10% shall be considered as forfeited to the Government, and shall be applied as directed in the act of March 3d, 1883.

"Where a cash deposit or certified check covering the amount offered accompanies the proposal, no bond need be furnished. Tie bids will be decided by the Secretary of the Navy by lots. All deposits by bidders whose proposals shall not be accepted will be returned to them within seven days after the opening of the proposals.

"The vessels may be examined upon applying to the commandant of the Navy Yard, Puget Sound, Wash. They must be removed from the limits of the yard by the purchasers at their own expense, within such reasonable time as may be fixed by the department.

"The department will not be responsible for errors or inaccuracies in the foregoing descriptions, as the vessels can be examined by parties interested, or for articles on board after the sale.

"R. F. NICHOLSON,
"*Acting Secretary of the Navy.*

"Navy Department, Washington, D. C., October 22nd, 1910."

Having received the aforesaid statement of the time and the conditions of sale, the relator submitted a bid of $20,000, accompanied by a certified check for the full amount thereof. When the bids were opened in due course, it appeared that relator's bid was the highest offer made for said vessel. The papers on file show that

relator had complied with all the terms and conditions of said sale. The respondent notified relator that he would not deliver the vessel for the reason that it had been determined to lend the same to the State of Oregon for use by the Naval Militia of said State. Early in January, 1911, respondent notified relator that he would not deliver the vessel and was returning his said check. Relator replied at once that he would not accept the return of said check, and demanded the delivery of the vessel. The respondent did return the check to the relator, who holds it subject to the order and disposition of the former, and is ready and willing to produce and surrender the same. Claiming that he is the purchaser and true owner of the vessel, and entitled to its possession, he prays for a writ of mandamus to issue commanding the respondent to receive the check and deliver the possession of the vessel. The return of the Secretary to the rule to show cause why the writ should not issue, admits the foregoing facts. The grounds of defense are: (1) That the matter of accepting or rejecting offers to purchase said vessel rests in the discretion of the Secretary who rejected relator's offer. (2) That the vessel is the property of the United States, not subject to any claim of relator. (3) That relator has a full and complete remedy in the Court of Claims.

Relator demurred to the return. The demurrer was overruled, the rule to show cause discharged, and the petition dismissed.

The case turns upon the construction to be given to section 5, of the act of March 3, 1883 (22 Stat., 599), which reads as follows: "It shall be the duty of the Secretary of the Navy to cause to be appraised, in such a manner as may seem best, all vessels of the Navy, which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August 5, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall after such appraisal, advertise for sealed proposals for the purchase of the same, for a period of not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price there for above the appraised value thereof, and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer, or proposal, and also a bond with two or more sureties to be approved by him, conditioned for the payment of the remaining 90% of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per cent, or any part thereof, the Secretary within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the Government, and shall

be applied, first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel, and the balance, if any, shall be covered into the Treasury: Provided, however, That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing."

* * *

The relator contends that the only discretion committed to the respondent by the statute was completely exercised when he decided to offer the condemned vessel for sale and advertised it therefor; and that upon relator's compliance with the conditions of sale, namely, making the highest bid for the vessel, above the appraised value, and accompanying the same with the purchase money, the right to the possession of the vessel became vested immediately in him, and it became the plain duty of the respondent to deliver the same. We are unable to concur in this contention. It is reasonably practicable for Congress to provide on broad lines only for the control and disposition of vessels belonging to the United States, and wide discretion in respect of the many details thereof has necessarily been committed to the discretion of the Executive Department. The statute under consideration does not, in terms, declare that a vessel when offered for sale shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after advertisement rendering it important to reconsider the decision to sell, and to retain the vessel for the uses of the Government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, and that "any vessel sold," shall be delivered to the purchaser. Congress might have directed the sale to be made at public auction to the highest bidder, instead of through written bids, to be opened upon the advertised date. Had this been done, it could not be successfully contended that the sale at such auction would be complete until the acceptance of the highest bid. It is settled law that an auction sale, whether made by a private owner or by an officer under execution, or a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid, and may withdraw the property from sale. Until acceptance of his bid, the bidder acquires no title to the property. Blossom v. Railroad Co., 3 Wall., 196-206. We perceive no difference between a sale made at public outcry and one made in the manner prescribed by statute. In each case it is an offer for sale to the highest bidder, and no sale is made until the bid is accepted. Here, notwithstanding the relator's bid was the highest, and its acceptance might have been advisable, the representative of the Government, charged with the conduct of the sale,

decided not to accept it, and, therefore, no sale was actually made. In view of this conclusion, other questions that have been argued need not be considered.

There was no error in dismissing the petition and the judgment will be affirmed with costs.

Affirmed.

WEDNESDAY, *May 24th*, A. D. 1911.

April Term, 1911.

No. 2284.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG, Appellant,
vs.
GEORGE VON L. MEYER, Secretary of the Navy.

Appeal from the Supreme Court of the District of Columbia.

This cause came on to be heard on the transcript of the record from the Supreme Court of the District of Columbia, and was argued by counsel. On consideration whereof, it is now here ordered and adjudged by this Court that the judgment of the said Supreme Court in this cause be and the same is hereby affirmed with costs.

Per Mr. Chief Justice SHEPARD.

May 24, 1911.

MONDAY, *May 29th*, A. D. 1911.

No. 2284.

THE UNITED STATES OF AMERICA ex Relatione A. GOLDBERG, Appellant,
vs.
GEORGE VON L. MEYER, Secretary of the Navy.

On motion of Mr. Charles Poe, attorney for the appellant, it is ordered by the Court that a writ of error to remove this cause to the Supreme Court of the United States issue, and the bond for costs is fixed at the sum of three hundred dollars. And it is further ordered that the mandate in said cause be and the same is hereby stayed for thirty days.

UNITED STATES OF AMERICA, *ss:*

The President of the United States to the Honorable the Justices of the Court of Appeals of the District of Columbia, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said Court of Appeals before you, or some of you, between The United States of America ex relatione A. Goldberg, appellant, and George Von L. Meyer, Sec-

retary of the Navy, appellee, a manifest error hath happened, to the great damage of the said appellant as by his complaint appears. We being willing that error, if any hath been, should be duly corrected, and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning the same, to the Supreme Court of the United States, together with this writ, so that you have the same in the said Supreme Court at Washington, within 30 days from the date hereof, that the record and proceedings aforesaid being inspected, the said Supreme Court may cause further to be done therein to correct that error, what of right, and according to the laws and customs of the United States should be done.

Witness the Honorable Edward D. White, Chief Justice of the United States, the 29th day of May, in the year of our Lord one thousand nine hundred and eleven.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Allowed by

——— ———,
——— ———.

(*Bond on Writ of Error.*)

Know all men by these presents, that we, A. Goldberg, as principal, and Herman W. Van Senden, as surety, are held and firmly bound unto George L. Von Meyer, Secretary of the Navy, in the full and just sum of three hundred dollars to be paid to the said George L. Von Meyer, Secretary of the Navy, his certain attorney, executors, administrators, successor or assigns; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents. Sealed with our seals and dated this 24th day of June, in the year of our Lord one thousand nine hundred and eleven.

Whereas, lately at a Court of Appeals of the District of Columbia, in a suit depending in said Court, between the United States of America ex relatione A. Goldberg a judgment was rendered against the said appellant and the said United States of America ex relatione A. Goldberg having obtained a writ of error and filed a copy thereof in the Clerk's Office of the said Court to reverse the judgment in the aforesaid suit, and a citation directed to the said George L. Von Meyer, Secretary of the Navy, citing and admonishing him to be and appear at a Supreme Court of the United States, to be holden at Washington, within thirty days from the date thereof:

Now, the condition of the above obligation is such, that if the said A. Goldberg shall prosecute said writ of error to effect, and answer all damages and costs if he fail to make his plea good, then

the above obligation to be void; else to remain in full force and virtue.

A. GOLDBERG. [SEAL.]
HERMAN W. VAN SENDEN. [SEAL.]

Sealed and delivered in the presence of—

CHAS. POE.

Approved by—

CHAS. H. ROBB,
Associate Justice Court of Appeals
of the District of Columbia.

The surety herein is satisfactory.

REGINALD S. HUDEKOPER,
Asst U. S. Attorney, D. C.

[Endorsed:] No. 2284. The United States of America ex Relatione A. Goldberg, Appellant, vs. George Von L. Meyer, Secretary of the Navy. Bond on Writ of Error to Sup. Ct. U. S. Court of Appeals, District of Columbia. Filed Jul. 3, 1911. Henry W. Hodges, Clerk.

UNITED STATES OF AMERICA, *ss:*

To George Von L. Meyer, Secretary of the Navy, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, at Washington, within 30 days from the date hereof, pursuant to a writ of error, filed in the Clerk's Office of the Court of Appeals of the District of Columbia, wherein The United States of America, ex relatione, A. Goldberg, is plaintiff in error and you are defendant in error, to show cause, if any there be, why the judgment rendered against the said plaintiff in error as in the said writ of error mentioned, should not be corrected, and why speedy justice should not be done to the parties in that behalf.

Witness, the Honorable Chas. H. Robb, Associate Justice of the Court of Appeals of the District of Columbia, this 3d day of July, in the year of our Lord one thousand nine hundred and eleven.

CHARLES H. ROBB,
Associate Justice of the Court of Appeals
of the District of Columbia.

Service accepted this 3d day of July, A. D. 1911.

CLARENCE R. WILSON,
U. S. Attorney, D. C.

[Endorsed:] Court of Appeals, District of Columbia. Filed Jul. 3, 1911. Henry W. Hodges, Clerk.

Court of Appeals of the District of Columbia.

I, Henry W. Hodges, Clerk of the Court of Appeals of the District of Columbia, do hereby certify that the foregoing printed and typewritten pages numbered from 1 to — inclusive, contain a true copy of the transcript of record and proceedings of said Court of Appeals in the case of The United States ex relatione, A. Goldberg, Appellant, vs. George Von L. Meyer, Secretary of the Navy, No. 2284, April Term, 1911, as the same remains upon the files and records of said Court of Appeals.

In testimony whereof I hereunto subscribe my name and affix the seal of said Court of Appeals, at the City of Washington, this 5th day of July, A. D. 1911.

[Seal Court of Appeals, District of Columbia, 1893.]

HENRY W. HODGES,
Clerk of the Court of Appeals of the District of Columbia.

Endorsed on cover: File No. 22,830. District of Columbia Court of Appeals. Term No. 79. The United States of America ex relatione A. Goldberg, plaintiff in error, vs. Josephus Daniels, Secretary of the Navy. Filed August 4th, 1911. File No. 22,830.

10

Supreme Court, U. S.
FILED.
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JAMES H. McKENNEY

Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 79.

THE UNITED STATES OF AMERICA, *ex relatione* A. GOLDBERG, *Plaintiff in Error*,

vs.

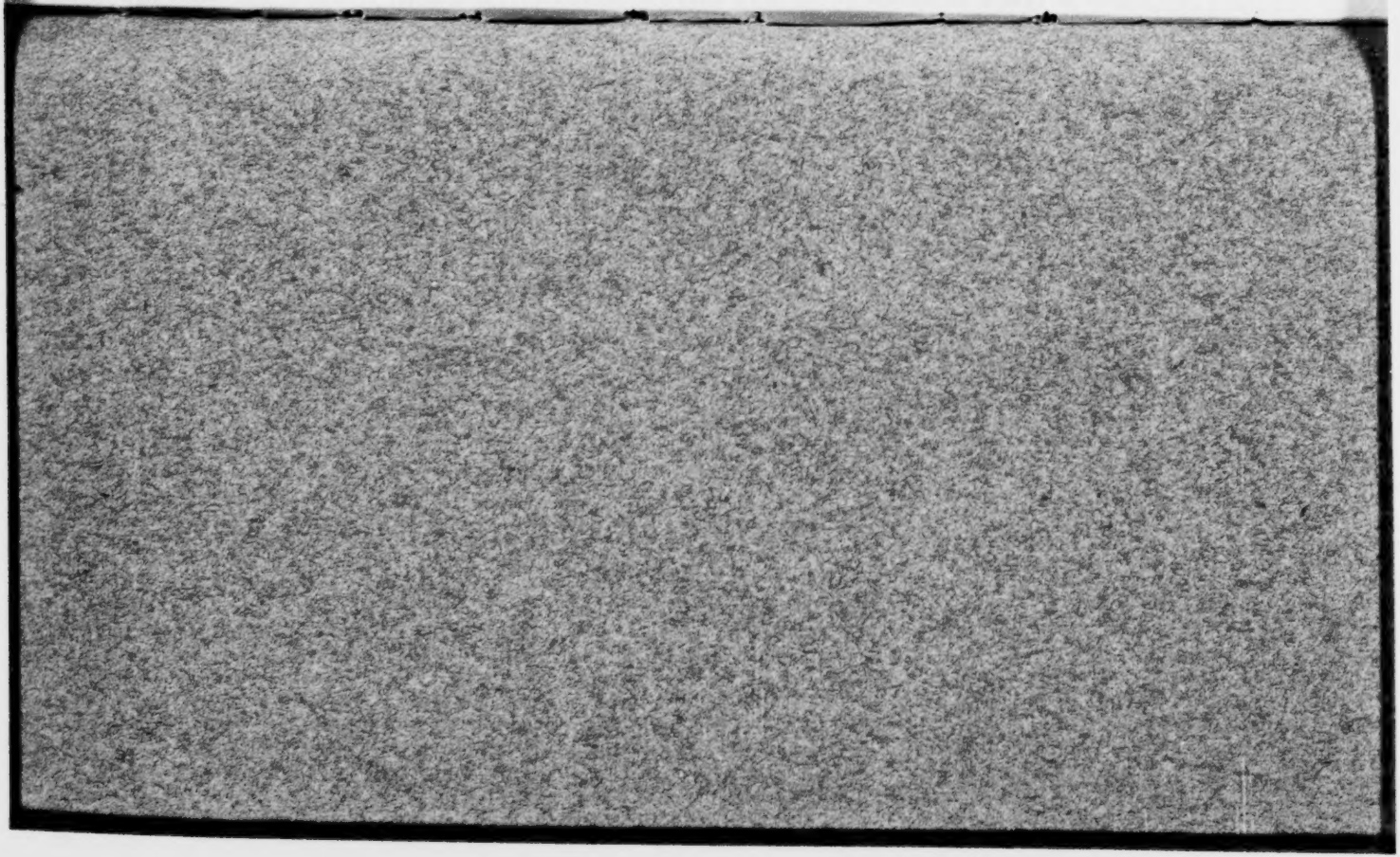
JOSEPHUS DANIELS, *Secretary of the Navy*.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

In Error to the Court of Appeals of the District of Columbia.

CHARLES POE,
ALBERT N. EASTMAN,
Attorneys for Plaintiff in Error.

PRESS OF THE SUDWARTH COMPANY, WASHINGTON.



Supreme Court of the United States.

OCTOBER TERM, 1913.

No. 79.

THE UNITED STATES OF AMERICA, *ex relatione* A. GOLDBERG, *Plaintiff in Error*,

vs.

JOSEPHUS DANIELS, *Secretary of the Navy*.

In Error to the Court of Appeals of the District of Columbia.

BRIEF ON BEHALF OF THE PLAINTIFF IN ERROR.

STATEMENT.

This writ of error brings up for review a judgment of the Court of Appeals for the District of Columbia affirming a judgment of the Supreme Court of the District of Columbia refusing a writ of mandamus commanding the Secretary of the Navy to deliver to the Relator the Cruiser

Boston. The Supreme Court of the District of Columbia overruled a demurrer interposed by the Relator to the answer of the Secretary of the Navy to the petition praying for the writ of mandamus and the action of that court was sustained by the Court of Appeals of the District of Columbia, the writ of mandamus was refused and the petition therefor was dismissed with costs. (Rec., p. 18).

The petition for the writ of mandamus was filed February 8th, 1911 (Rec. 1), and this controversy presents for the first time the construction by this Court of Section 5 of the Act of Congress, approved March 3d, 1883 (22 Stat. L. 500) which was set out in *hace verba* in the petition (Rec. 2) and is likewise here reproduced for convenience:

> "It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August 5, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published, setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer or proposal, and also a bond,

with two or more sureties to be approved by him, conditioned for the payment of the remaining ninety per centum of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per centum, or any part thereof, the Secretary, within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the government, and shall be applied first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel; and the balance, if any, shall be covered into the Treasury: *Provided, however*, That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing. In case any vessel now in process of construction in any navy yard has been or shall be found to be unworthy of being completed, and has been and shall be condemned under the provisions of said act, and cannot properly be sold, and it becomes necessary to remove the same, the cost of such removal shall be paid out of the net proceeds derived from the sale of other vessels hereby authorized to be sold."

The allegations of the petition (Rec. 1-7) and averments of the answer (Rec. 7-10) admit:

1st. The Secretary, after due condemnation of the Cruiser Boston as provided by Chapter 391, Sec.

2 (22 Stat. L. 296) (Rec. 2) proceeded under and complied with the above *Sec. 5*.

2d. The Relator likewise fully complied therewith.

3d. On the opening of the bids, as therein provided, the Relator was found to be the highest bidder, having bid Twenty Thousand ($20,000) Dollars and deposited his certified check with the bid, which was Seven Thousand ($7,000) Dollars above the "appraised value."

4th. This check was retained for ten days by the Secretary, who then for the first time notified the Relator "by telegram" that he had rejected the bid of the Relator (Bids opened December 7) (Rec. 3 and 8), telegram sent December 17 (Rec. 9).

5th. The Secretary states in his answer, in justification of his actions:

(a). That in *so* rejecting the bid he acted in the exercise of his "*discretion*" (Rec. 9).

(b). That he *so* proceeded "for the purpose of ascertaining at what price the vessel might be sold." (*There is no averment that this alleged "purpose" was ever disclosed.*) (Rec. 8.)

(c). That the Government now refuses to deliver the Cruiser because it has engaged "to loan said Cruiser Boston to the Governor of the State of Oregon 'for the use of the naval militia.'" (Rec. 8).

(d). That he had a right to do as above because he had never accepted the bid of the Relator and the above precedure had not constituted a sale.

The answer further claims that the Relator has "a complete remedy * * * in the Court of Claims or at law." (Rec. 9.)

The petition also reproduces the advertisement for proposals for bids (Rec., p. 5), and alleges the facts which made him acquaint himself fully with the terms and conditions of the sale and induced him to become a bidder for the Cruiser, and the exhibit which accompanies the petition shows the printed information furnished to the Relator by the Department concerning the sale of the Cruiser; (Rec., pp. 5-6); and it then properly alleges the demand by the Relator for the delivery of the vessel to him and the refusal by the Secretary of the Navy to comply with said demand and asserts the right of relief by the writ of mandamus. (Rec., pp. 3-4).

It is contended by the Relator that:

> When the bids were opened under the above circumstances, the contract was complete and as the Relator was bound thereby and could not have then changed his mind and lawfully demand a return of his $20,000 check, the Government was *equally* bound and the further acts of the Secretary, after opening of the bids, were purely ministerial, to-wit: deliver the Cruiser.
>
> .

If we are right in our position, we are entitled to have the writ issue.

ASSIGNMENT OF ERRORS.

The court below erred:

FIRST. In affirming the judgment of the Supreme Court of the District of Columbia overruling the demurrer to the return to the petition for the writ of mandamus.

SECOND. In deciding that there was no contract be-

tween the Secretary of the Navy and the Relator for the sale of the Cruiser Boston; and

THIRD. In deciding that the duty to deliver the Cruiser Boston to the Relator was not a duty purely ministerial in its nature.

ARGUMENT.

Two questions present themselves for the consideration of the Court.

FIRST. WAS THERE A BINDING CONTRACT FOR THE SALE OF THE CRUISER BOSTON TO THE RELATOR? And, if there was:

SECOND. IS MANDAMUS THE APPROPRIATE REMEDY TO COMPEL ITS PERFORMANCE?

I.

As has been said, the case comes before the Court upon demurrer. It appears from the pleadings that the Relator had carried out and performed everything which was to be done by him. He had paid the full purchase price of the cruiser. The minute the bids were opened and his "proposal or bid" was ascertained to be the highest proposal or bid, and the money was paid, the Statute (Sec. 5) provides: "The net proceeds of the sale shall be covered into the Treasury" and "Any vessel sold under the foregoing provisions shall be delivered to the purchaser * * *." (Rec., 2, bottom page.)

It is not even suggested and it would be useless to do so, namely: That the Relator could have withdrawn his bid or retracted his offer *after the sealed bids had been opened.* If he was bound, by what principle of law was the Secretary of the Navy released?

The Court of Appeals, in its opinion (Rec. 17), likens

the case to a sale by public auction. We submit that such similarity does not exist. In a sale by public auction, it is necessary that there should be "The fall of the hammer" or "The nod of the auctioneer." This auctioneer is the agent of both parties to signify the meeting of their minds. In the case at bar, the statute itself was the auctioneer, and by its very terms and provisions, the opening of the bids was the "Fall of the hammer." The ascertainment of who was the highest bidder, *eo instanti*, was the meeting of the minds. The statute directs upon the payment of the purchase price, the delivery of the vessel unto the person so making the highest proposal or bid and paying therefor.

Justice Shepard, in the Court of Appeals in this case relies on the case of Blossom *vs.* Railroad Co., 3 Wall., 196-206. The only question there determined was that a marshal, in the execution of a decree for the judicial sale of property, had the right to adjourn the sale to a future date and to report to the court that an offer made to him, in his judgment, should not be accepted. In the course of the opinion in that case, the court did go somewhat extensively into the question of what constituted the acceptance of a bid at *public auction*. Nowhere did that case determine that it was necessary for any one to go through the useless formality of telling the purchaser what the statute itself already had told him where there was a statute which prescribed the means and the sole means of ascertaining who was the highest bidder and that he should get the article exposed to sale when he was so ascertained.

All of these cases defining the rights of the parties at public auction clearly state that the purchaser can retract his bid before it is accepted, and that each, one and all, recognize that the fall of the hammer or the nod of the auctioneer constitutes the meeting of the minds and consummates the sale. As there is no such auctioneer where sealed bids are thus submitted, the statute takes the place

of this auctioneer, and this Section 5 as we have seen provides that the bids shall be opened "on a day and an hour and at a place named in said advertisement, and record thereof shall be made * * * (and that when the amount of the bid has been paid), the net proceeds shall be covered into the Treasury * * *. Any vessel sold under the foregoing provision *shall* be delivered to the purchaser * * *."

Not only does this statute (Sec. 5) direct the sale of vessels belonging to the United States in the manner prescribed therein, but it provides, in express terms: "But no vessel of the navy shall hereafter be sold in any other manner * * *" (Rec. 3). This Court has determined that no Government property can be sold under statutes similar to the one in question except in the way prescribed by law. (Steele *vs.* U. S., 113 U. S., 128).

If we were applying the rules ordinarily applicable to the sale of personal property, instead of likening this transaction to an auction sale, we should liken it to a sale by correspondence. Taylor *vs.* Insurance Co., 9 Howard 390. Benjamin on Sales, 7th Edition, Bennett's Notes, page 54, Section 44; also page 68, Section 64; see also the American note on page 70 of the same work.

The facts show that there was a public advertisement requesting proposals for the Cruisers Concord and Boston (Rec., p. 3), which stated that the terms and conditions of the sale could be had upon application to the Navy Department and that the bids would be open December 7th, 1910, at noon, and that the Relator applied for and obtained the document setting forth specifically all the terms and conditions of sale. (These are set forth fully in Rec., p. 5). *No right to reject bids was reserved, and it is submitted that under the statute no right to reject bids could have been reserved.* The only limitations there made upon the right of a purchaser to be considered the successful bidder were,

that his bid should be the highest and should exceed the appraised value of the boat. The absolute statement in the terms and conditions of the sale that the cruiser would be sold to the highest bidder therefor for cash, taken in connection with the reference to the statute under which the sale was being conducted, justified the Relator in believing in its truth and in going to his bank and practically withdrawing therefrom the large sum of $20,000. We submit that if the question were between individuals there would be no hesitation in determining that every element to constitute a contract of sale of personal property was present and neither one could back out under such circumstances.

We submit the integrity of the Government demands it deliver this Cruiser. If the Government does not make delivery, can it ever expect honest bids when it thus advertises? If the Government can thus refuse, equally so can the individual when the sealed bids are opened and he finds he has been foolish in bidding too much, or for other personal reasons of his own he desires to change his mind. This very condition is forestalled and forbidden by this Section 5, which provides (Rec. 2) that the deposit, if less than the whole, shall be forfeited, etc.

What is the purpose of sealed bids? Of what avail if either can withdraw? Why the farce of depositing a check for $20,000, if it is to be returned on demand after the bids are opened? What analogy has this to an *open* auction sale?

Some stress has been laid upon the fact that there is no evidence that the Secretary of the Navy ever notified the Relator that he had accepted his bid, and never, in fact, did accept it. Let us briefly consider the facts upon this subject. One of the terms of the sale is "All deposits by bidders whose proposals shall not be accepted will be returned to them within *seven* days after the opening of the proposals." (Rec., p. 6). The answer of the Secretary of the Navy shows that it was not until the 17th of December, 1910, that

the Relator was notified by telegram that his bid had been rejected, which was *ten* days after the bids had been opened and the bid of the Relator had then been ascertained to be the highest bid for the cruiser.

Some time later (the record does not show when) the Secretary attempted to return this certified check. By what right has the Relator been kept out of the use of this money all this time and is now asked what he can do about it, and all this because the Secretary has had a concealed purpose or changed his mind? Under the circumstances of this case, the failure to return this check within the time limit, which was a part of the condition of the sale as advertised (Rec. 6) is clear evidence that the bid of the Relator had been accepted. This would be equally so had the Statute given the Secretary the power to reject bids, which of course we deny. As between individuals such unexplained retention of the check would be so regarded, and why not here?

The Secretary of the Navy in his answer says that he did not advertise for the purpose of making a sale, but for the purpose of finding out whether he would deem it to the best interests of the United States to sell. Was it right for him to conceal his purpose? Had he disclosed his true alleged purpose as now disclosed for the first time, would the Relator have put up a *certified* check for $20,000.00? Would he not have waited to see how his competitors regarded the proposition and then bid when the real sale was to take place? We must not forget he would have had a chance for a *real* bid(!) because this Section 5 expressly provides: "No vessel of the Navy shall hereafter be sold in any other manner." (Rec. 3).

We are indeed curious to know what the Secretary of the Navy would have done with the information which he says he wished thus to acquire? What authority he can point to to *justify* his putting the Government to the expense of advertising in the way he did to get *such* information?

What was there to advise the Relator this was not a *real* sale? As the Secretary could only sell in this manner, the Relator had a perfect right to rely on his rights under the Statute and the Secretary cannot take advantage of a *concealed purpose*.

II.

It was contended in the courts below, and may be repeated here, namely: This is a contract and cannot be enforced because there has been no compliance with Section 3744 of the United States Revised Statutes which for convenience is here quoted in full:

> "It shall be the duty of the Secretary of War, of the Secretary of the Navy and of the Secretary of the Interior, to cause and require every contract made by them severally on behalf of the Government, or by their officers under them appointed to make such contracts, to be reduced to writing, and signed by the contracting parties with their names at the end thereof; a copy of which shall be filed by the officer making and signing the contract in the Returns Office of the Department of the Interior, as soon after the contract is made as possible, and within thirty days, together with all bids, offers, and proposals to him made by persons to obtain the same, and with a copy of any advertisement he may have published inviting bids, offers, or proposals for the same. All the copies and papers in relation to each contract shall be attached together by a ribbon and seal, and marked by numbers in regular order, according to the number of papers composing the whole return."

We submit this contention will not prevail in point of fact and Section 3744 has nothing to do with this sale.

Even in those cases where it has been held this Section 3744 governs, it is also held that if the contract has been

performed this Section 3744 would not apply. (St. Louis Hay & Grain Co. *vs.* U. S., 191, U. S., 159.)

This Court has likewise held (Garfield *vs.* U. S. 93, U. S. 242) that proposals on the one hand and the bid and the payment of the full amount on the other is sufficient. We contend that this transaction was a completed contract, fully executed by the payment of the entire purchase money when the bids were opened, and the Relator was found to be the highest bidder.

We therefore submit that, both upon elementary principles controlling the sale of personal property as well as upon the specific provisions of Section 5 of the Act of March 3d, 1883 (22 Stat. L., 559), the Relator became the owner of the Cruiser Boston immediately upon the fact being ascertained that he was the person making the highest proposal or bid therefor and the receipt by the Secretary of the Navy of his certified check for the full amount of such proposal or bid.

This Section 3744 refers to "Every contract made by them severally on behalf of the Government * * *." It will readily be conceded that nothing could be done under this Section 3744 to provide for the sale of the Boston Cruiser until after Section 5 had been fully complied with. After Section 5 was complied with and the money paid, how could a contract under Section 3744 be worded? What would be contracted to be done? Everything has then been done. The deal has been closed. The money has been paid by the purchaser. If the Secretary has obeyed the Statute, he has "covered (it) into the Treasury." Does it need a contract to have him perform the ministerial act of delivery where the Statute commands, (Sec. 5):

> "Any vessel sold under the foregoing provision *shall* be delivered to the purchaser?"

It is self-evident this Section 3744 has no bearing except in the inception of executory contracts. The examination of all cases discussing this Section 3744 but emphasizes the fact that it covers only *executory* not executed contracts.

It is a well-known principle of law that the Statute of Frauds cannot be pleaded to an executed contract. (Cleveland C. C. & St. L. Ry. Co. *vs.* Wood, 189, Ill. 352, 355).

Again: Section 3744 was passed in 1862 as a general act. Section 5 in 1883 as a special act to govern the sale of vessels.

> "Where there is one Statute dealing with a subject in general and comprehensive terms and another dealing with a part of the same subject in a more minute and definite way, the two should be read together and harmonized, if possible, with a view to giving effect to a consistent legislative policy, but to the extent of any necessary repugnancy between them the special will prevail over the general Statute. Where the special Statute is later, it will be regarded as an exception to, or qualification of, the prior general one."
>
> 36 Cyclopedia of Law & Procedure, page 1151 and cases cited.
>
> Federal Statutes Annotated, Vol. One, and Moore's Annotations, pages cxiv-cxvii.

This entire matter is put entirely at rest by the special provision in this later Statute, Section 5, wherein it is recited:

> "But no vessel of the navy shall hereafter be sold in any other manner than herein provided."

III.

We now come to the consideration of SECOND PROPOSITION, to wit:

IS MANDAMUS THE APPROPRIATE REMEDY TO COMPEL ITS PERFORMANCE?

This is simply a question as to whether under the above admitted conditions, any discretion was left to the Secretary of the Navy under Section 5.

If there was such discretion, the writ should not issue.

If there was no such discretion, it is respectfully submitted mandamus is appropriate and the writ should issue.

What discretion does Section 5 leave to the Secretary under the admitted facts in this case? We insist absolutely none. The Secretary *may* have had a discretion, after the appraisal was made, to have had a new appraisal made before he undertook to advertise. He may have had a discretion as to whether he would determine it was for the best interests of the United States to sell the vessel at all. But after he once exercised that judgment and stated by advertisement, in accordance with the other provisions of Section 5, that "these vessels *will* be sold for cash to the bidders offering the highest prices above the appraised value," (Rec. 6), there was no further judgment to be exercised by him; his discretion was exhausted; his duties thereafter became purely ministerial. In the advertisement itself (Rec., p. 6), the Secretary of the Navy determined this question of discretion for himself, even if he had any, which we deny. By this same advertisement he excluded all idea that a discretion existed. One of the conditions was:

> "Where a cash deposit or certified check covering the amount offered, accompanies the proposal no bond need be furnished. *Tie bids will be decided by the Secretary of the Navy by lot.*" (Rec. 6.)

We insist he had no authority to make this condition, but he did it.

Your Honors will observe that the Secretary does not even try to reserve the right to reject bids. It is unqualifiedly stated in the advertisement, as directed by the statute,

that the vessel *shall* be sold to the highest bidder, that it *shall* be delivered to such purchaser upon the full payment of the amount of his proposal or bid, and it is expressly provided by the statute that no vessel shall be sold in any other manner.

When these *sealed bids* were opened under the above circumstances, we respectfully insist this vessel ("any vessel") *was* "sold under the foregoing provisions" and "*shall* be delivered to the purchaser" and we fully expect this Court will so direct.

We have examined the authorities upon which the defendant relied in the lower court and which no doubt will be urged upon this appeal, and if so, we may desire to reply, but in hopes we may not find it necessary to do so, we have this to say about all of them: That in every instance they refer to the letting of contracts for public works to the "best," or "most responsible" bidder, most of them reserving in the advertisement the right to reject all bids; they therefore involve an element of discretion in the officers entrusted with the letting of the contract. While they may not have been improperly decided, we respectfully submit that they are not at all apposite to the question involved in this case where nothing was to be done except the mere ascertainment as to whose bid was highest and where the rights of no other bidders have supervened and where it would have been impossible for the Relator to have escaped from his liability under his bid, if he had attempted to do so. It is not worth while to make extended extracts from the numerous opinions of this Court in cases where the writ of mandamus has been granted or refused. The last reported case upon the subject is that of Knight *vs.* Lane, 228 U. S., 6. In this case, the writ was refused because the court was of opinion that the Secretary of the Interior had a discretion in the matter involved in that proceeding. In the case of Parrish *vs.* MacVeagh, 214 U. S., 124, the court granted the writ against

the Secretary of the Treasury and directed him to have an account stated by his expert accountants because the court determined that this was simply a ministerial function preceding the payment of amount to be ascertained, and which had been ordered to be paid by an Act of the Congress. In Garfield *vs.* Goldsby, 211 U. S., 249, this Court decided that even where there had been a discretion vested in the Secretary of the Interior to do or not to do a particular thing, when that thing had been done his discretion was at an end, and he had no power to revoke or rescind his action without notice.

Mr. Justice Day, speaking for the Court in that case, used the following language:

> "The right to be heard before property is taken or *rights or privileges withdrawn* which have been previously legally awarded, is of the essence of due process of law. It is unnecessary to recite the decisions in which this principle has been repeatedly recognized. It is enough to say that its binding obligation has never been questioned in this Court."

IV.

There seems to be nothing left for us but to consider the language of Section 5 in connection with the opinion of the Court of Appeals (Rec., p. 17).

The learned Judge, Justice Shepard, in his opinion (Rec., p. 17), says:

> "It is reasonably practicable for Congress to provide on broad lines only for the control and disposition of vessels belonging to the United States, and wide discretion in respect to the many details thereof has necessarily been committed to the discretion of the Executive Department. The statute under consideration does not, in terms, declare that a vessel when offered for sale, shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after advertisement rendering it important to re-

> consider the decision to sell, and to retain the vessel for the uses of the Government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, and that 'Any vessel sold,' shall be delivered to the purchaser."

We do not desire to put ourselves in the attitude of disputing the power of Congress or that it *might* have done what the learned judge states it had the power to do. We do respectfully contend it has *not* done so, and that it is difficult to conceive a statute more *particular* and *specific* in its directions and commands to the Secretary of the Navy as to the mode, manner and method of his proceeding than this Section 5 in question. It does *not* provide "*on broad lines only.*" The statute itself shows that Congress has actually provided on exceedingly narrow lines in the matter of the sale of a warship of the United States Navy. Not only does this statute say that you *shall* sell in the way in which it particularizes, but it emphatically says that you *shall not* sell "In any *other* manner."

We submit that the Justice who wrote the opinion is not quite accurate in quoting the statute itself! This Statute, Section 5, does not say "*any vessel sold*," and stop there. It says "Any vessel sold *under the foregoing provisions shall be delivered to the purchaser.*" (Rec. 17).

Nor is this Justice quite accurate when he states (Rec. 17): "*All* that it commands is that it shall be *offered* for sale in a particular manner * * *." That is not *all* it commands. This Section 5 is much broader. It is absolutely complete in itself. It is not a mere provision to "*offer*" for sale. The statute in its very wording recognizes itself as complete when it states: "Any vessel sold under the foregoing provisions * * *." "No vessel shall be sold in any other manner * * *."

It is true that when thus advertised, there might be no bidders or bidder offering more than the appraised amount, or who deposit the ten per cent, or who make the final pay-

ment and there would of course be no sale; but when, as in this case, every provision of the Statute has been fully and completely complied with, there is a completed sale, and that is what is meant by the words "Any vessel sold under the foregoing provisions *shall be delivered* * * *." (Rec. 2.)

V.

Another suggestion was made in the answers as to why the writ of mandamus should not issue, namely: The Relator had his right of action in the Court of Claims for the breach of his contract by the Secretary of the Navy. In other words, that a man who had given $20,000 for a piece of personal property which is worth only $13,000 had adequate remedy against the vendor for not delivering it to him in an action for damages in which he could only recover the difference between the value of the thing sold and the sum which he had agreed to pay. It was also suggested that the Relator might institute an action of replevin and take from the Governor of Oregon his property which had been wrongfully delivered to that Governor by the Secretary of the Navy. Is it conceivable that the Secretary of the Navy should make the suggestion that *that* proceeding was a remedy adequate to relieve him from his public duty to an humble citizen? We do not feel called upon to *now* elaborate upon the fallacy of such a contention.

We respectfully submit that the integrity of the Government and its ability to deal with the public under this and similar statutes demand it and we urge that justice and fair dealing require it and therefore request that the judgment of the Court of Appeals of the District of Columbia should be reversed and the writ of mandamus be directed to be issued.

CHARLES POE,
ALBERT N. EASTMAN,
Attorneys for Plaintiff in Error.

No. 73.

In the Supreme Court of the United States

October Term, 1913.

THE UNITED STATES OF AMERICA ex relatione A. GOLDMAN, plaintiff in error,

v.

JOSEPHUS DANIELS, Secretary of the Navy,

in error to the Supreme Court of the District of Columbia.

BRIEF FOR DEFENDANT IN ERROR.

In the Supreme Court of the United States.

OCTOBER TERM, 1913.

THE UNITED STATES OF AMERICA, EX RELATIONE A. GOLDBERG, plaintiff in error,
v.
JOSEPHUS DANIELS, SECRETARY OF THE NAVY.
No. 79.

IN ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

BRIEF FOR DEFENDANT IN ERROR.

STATEMENT.

Plaintiff in error, resident in Vancouver, B. C., sought, as relator in *mandamus*, in the Supreme Court of the District of Columbia, to compel the Secretary of the Navy to deliver to him the United States cruiser *Boston*.

He alleged, in substance, that at the opening of sealed proposals, which had been invited by the Secretary of the Navy for the purchase of the ship, one submitted by him, with his certified check for the

entire amount offered, was the highest bid in excess of the vessel's appraised value; that he had fully complied with the conditions imposed upon bidders by the Navy Department; that his proposal had been rejected, his check returned, and the delivery of the vessel, though demanded, refused by the Secretary, in violation of his duty to accept the bid and to deliver the cruiser; that he has tendered the identical check, which had been returned to him over his protest, and still tenders it, to the Secretary.

The Secretary of the Navy, answering the rule, saving certain defenses as if he had demurred, stated, in effect, that the proposals had been asked for the purpose of ascertaining at what price the *Boston* might be sold; that the relator's bid was a mere offer which had never been accepted by him or by anyone else on his behalf; that the cruiser then was, as she had ever been since her commission, a vessel of the United States Navy, the property of the United States of America; that he was by law vested with the discretion to determine whether it was for the best interest of the United States to sell the vessel, a discretion remaining with and not taken from him by the submission of bids; that he had notified the relator he would not deliver the cruiser; had returned his check, and that the Government of the United States had engaged to lend the vessel to the governor of the State of Oregon for use by the naval militia of that State.

The relator demurred to this return, and a judgment discharging the rule and dismissing his petition in the Supreme Court of the District of Columbia was affirmed by the Court of Appeals, to which the present writ was allowed. Error is assigned generally to this judgment, and special errors are alleged "in deciding * * * that there was no contract between" the parties, and "the duty to deliver * * * was not * * * purely ministerial." (Relator's brief, pp. 5, 6.)

The law under consideration, the advertisement thereunder, dated October 22, 1910, and the departmental circular of information to bidders of the same date are, respectively, as follows:

Section 5 of the naval appropriation act of March 3, 1883 (22 Stat. 599):

> It shall be the duty of the Secretary of the Navy to cause to be appraised, in such manner as may seem best, all vessels of the Navy which have been stricken from the Navy Register under the provisions of the act making appropriations for the naval service for the fiscal year ending June thirtieth, eighteen hundred and eighty-three, and for other purposes, approved August 5, eighteen hundred and eighty-two. And if the said Secretary shall deem it for the best interest of the United States to sell any such vessel or vessels, he shall, after such appraisal, advertise for sealed proposals for the purchase of the same, for a period not less than three months, in such newspapers as other naval advertisements are published,

setting forth the name and location and the appraised value of such vessel, and that the same will be sold, for cash, to the person or persons or corporation or corporations offering the highest price therefor above the appraised value thereof; and such proposals shall be opened on a day and hour and at a place named in said advertisement, and record thereof shall be made. The Secretary of the Navy shall require to accompany each bid or proposal a deposit in cash of not less than ten per centum of the amount of the offer or proposal, and also a bond, with two or more sureties to be approved by him, conditioned for the payment of the remaining ninety per centum of the amount of such offer or proposal within the time fixed in the advertisement. And in case default is made in the payment of the remaining ninety per centum, or any part thereof, the Secretary, within the prescribed time thereof, shall advertise and resell said vessel under the provisions of this act. And in that event said cash deposit of ten per centum shall be considered as forfeited to the government, and shall be applied, first, to the payment of all costs and expenditures attending the advertisement and resale of said vessel; second, to the payment of the difference, if any, between the first and last sale of said vessel; and the balance, if any, shall be covered into the Treasury: *Provided, however,* That nothing herein contained shall be construed to prevent a suit upon said bond for breach of any of its conditions. Any vessel sold under

the foregoing provisions shall be delivered to the purchaser upon the full payment to the Secretary of the Navy of the amount of such proposal or offer; and the net proceeds of such sale shall be covered into the Treasury. But no vessel of the Navy shall hereafter be sold in any other manner than herein provided, or for less than such appraised value, unless the President of the United States shall otherwise direct in writing. In case any vessel now in process of construction in any navy yard has been or shall be found to be unworthy of being completed, and has been and shall be condemned under the provisions of said act, and cannot properly be sold, and it becomes necessary to remove the same, the cost of such removal shall be paid out of the net proceeds derived from the sale of other vessels hereby authorized to be sold.

Proposals.—Sale of U. S. vessels *Boston* and *Concord.*—Sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened, for the purchase of the *Boston*, appraised value $13,000, and the *Concord*, appraised value $43,000. Forms of proposal and bond, and information concerning the vessels and the terms and conditions of sale, may be obtained on application to the Department. The vessels may be examined at the Navy Yard, Puget Sound, Wash. R. F. Nicholson, *Acting Secretary of the Navy.* 10–22–10.

General Information Concerning the United States Vessels Boston and Concord, Offered for Sale under the Provisions of the Act of Congress Approved March 3, 1883.

In accordance with the provisions of section 5 of the act of Congress approved March 3, 1883, sealed proposals will be received at the Navy Department until 12 o'clock noon, December 7, 1910, when they will be publicly opened, for the purchase of the United States vessels Boston and Concord, now lying at the Navy Yard, Puget Sound, Wash., these vessels having been stricken from the Navy Register, after survey, condemnation, and appraisal, under authority of the act of August 5, 1882.

As appraised by a board of survey and appraisal, the value of the Boston, as she lies, with certain articles of equipage and outfit suitable for further use by the Government removed, but with her boilers, main engines, dynamo engines, miscellaneous auxiliary machinery, spars, masts, standing rigging, boat davits, stanchions, deck winches, steering gear, main ventilating fans, and one anchor and a sufficient amount of chain for mooring purposes left on board, is $13,000. The value of the Concord as she lies, with her masts, booms, stanchions, davits, anchors and chains, fixed furniture, auxiliary machinery, main engines, boilers, electrical and mechanical communication instruments, plumbing and a part of the portable fur-

niture left on her, is appraised by the board at $43,000.

The Boston is an unarmored steel protected cruiser, with two-masted schooner rig and two funnels. She was built by John Roach & Sons at Chester, Pa., and was launched December 4, 1884. Length over all, 288 feet 3 inches; beam, extreme, 42 feet 2 inches; mean draft, 16 feet 10 inches; normal displacement, 3,000 tons; horizontal compound engines; eight single-ended Scotch boilers, trial speed, 15.60 knots; bunker capacity, 428 tons.

The Concord is an unarmored steel gunboat, with two-masted schooner rig, and one funnel. She was built by N. F. Palmer, Jr., & Co., at Chester, Pa., and was launched March 8, 1890. Length between perpendiculars, 230 feet; length over all, 244 feet 5 inches; breadth on load water line, 36 feet; mean draft, 14 feet; normal displacement, 1,710 tons; twin-screw horizontal triple expansion engines; eight straight-way cylindrical boilers; trial speed, 16.80 knots; I. H. P. of propelling machinery and its auxiliaries on trial, 3,359; bunker capacity, 354 tons.

These vessels will be sold for cash to the bidders offering the highest prices above the appraised values.

Separate proposals for each vessel must be submitted in a sealed envelope, addressed to the Secretary of the Navy, Washington, D. C., and endorsed "Proposal for the purchase of the U. S. S. ——" (insert name of

vessel for which offer is made), so as to distinguish it from other communications and prevent the opening thereof before the time fixed by the Department's advertisement of October 22, 1910.

Each proposal must be accompanied by a deposit in cash (or satisfactory certified check) of not less than 10 per cent of the amount of the offer or proposal, and also a bond in a penal sum equal to the whole amount of the offer, with two or more individual sureties, or with a corporate surety authorized to do business under the act of August 13, 1894, as amended by the act of March 23, 1910, to be approved by the Secretary of the Navy, conditioned for the payment of the remaining 90 per cent of the amount of such offer or proposal within thirty days from the date of its acceptance. In case default is made in the payment of the remaining 90 per cent or any part thereof within that time, said cash deposit (or check) of 10 per cent shall be considered as forfeited to the Government, and shall be applied as directed in the act of March 3, 1883.

Where a cash deposit or certified check covering the amount offered accompanies the proposal no bond need be furnished. Tie bids will be decided by the Secretary of the Navy by lot. All deposits by bidders whose proposals shall not be accepted will be returned to them within seven days after the opening of the proposals.

The vessels may be examined upon applying to the commandant of the Navy Yard,

Puget Sound, Wash. They must be removed from the limits of the yard by the purchasers at their own expense within such reasonable time as may be fixed by the Department.

The Department will not be responsible for errors or inaccuracies in the foregoing descriptions, as the vessels can be examined by parties interested, or for articles on board after the sale.

R. F. NICHOLSON,
Acting Secretary of the Navy.

NAVY DEPARTMENT,
Washington, D. C., October 22, 1910.

ARGUMENT.

The Duty to Sell was Discretionary.

The paramount object of the statute is "the best interest of the United States," and to the Secretary of the Navy is intrusted the duty of determining how this may be subserved. No sale shall be made by him in any other way, e. g., privately, or without advertisement, or upon credit, or under the appraised value; but there is no injunction that he may not consider a different use and ascertain what might be had from sale before concluding upon the course to be pursued. The mandatory directions as to the manner in which steps preliminary to a sale should be taken in order to validly consummate it must be read and understood *sub modo*. An inchoate or a fixed intention to sell at the time of first advertising for proposals may be affected by

many intervening contingencies before the three months preceding the date of opening the bids expire; if they be of such a nature as to modify the initial view, it would defeat the real object of the law to construe it as prohibiting a change of mind.

It is conceived that a purpose to sell might be lawfully abandoned on discovering, by inspecting the bids, the character of the parties or the possible uses to which the vessel, if sold, might be put. The discretion is expressly given the Secretary to approve or disapprove the security offered it. It can hardly be said that he is yet without discretion to withdraw the vessel from sale, rejecting all bids in order to avoid, for example, a transfer to an alien, which might be embarrassing internationally. On such grounds the Court of Appeals, through Mr. Chief Justice Shepard, based its judgment (Rec. 17):

> The relator contends that the only discretion committed to the respondent by the statute was completely exercised when he decided to offer the condemned vessel for sale and advertised it therefor; and that upon relator's compliance with the conditions of sale, namely, making the highest bid for the vessel, above the appraised value, and accompanying the same with the purchase money, the right to the possession of the vessel became vested immediately in him, and it became the plain duty of the respondent to deliver the same. We are unable to concur in this contention. It is reasonably practicable for Congress to provide on broad lines only for

the control and disposition of vessels belonging to the United States, and wide discretion in respect of the many details thereof has necessarily been committed to the discretion of the Executive Department. The statute under consideration does not, in terms, declare that a vessel when offered for sale shall not be withdrawn, but shall be declared sold to the highest bidder, regardless of conditions that may arise after advertisement rendering it important to reconsider the decision to sell, and to retain the vessel for the uses of the Government; nor can we interpret it so to mean. All that it commands is that the vessel shall be offered for sale in a particular manner, and that "any vessel sold," shall be delivered to the purchaser. Congress might have directed the sale to be made at public auction to the highest bidder, instead of through written bids, to be opened upon the advertised date. Had this been done, it could not be successfully contended that the sale at such auction would be complete until the acceptance of the highest bid. It is settled law that an auction sale, whether made by a private owner or by an officer under execution, or a decree, is not complete until the bid shall have been accepted, and the property struck off and declared sold to the bidder. The seller may decline to accept the bid, and may withdraw the property from sale. Until acceptance of his bid, the bidder acquires no title to the property. (*Blossom* v. *Railroad Co.*, 3 Wall., 196–206.) We perceive no difference between a sale

made at public outcry and one made in the manner prescribed by statute. In each case it is an offer for sale to the highest bidder, and no sale is made until the bid is accepted. Here, notwithstanding the relator's bid was the highest, and its acceptance might have been advisable, the representative of the Government, charged with the conduct of the sale, decided not to accept it, and, therefore, no sale was actually made. In view of this conclusion, other questions that have been argued need not be considered.

It is only where, in any view of the facts that can be taken, the action is beyond the scope of the authority of the head of a department that the court is authorized to interfere (*New Orleans* v. *Paine*, 147 U. S. 264), and whether his decision were right or wrong is not the question. (*Riverside Oil Co.* v. *Hitchcock*, 190 U. S. 325.) Mandamus has never been regarded as the proper writ to control the judgment and discretion of an officer as to the decision of a matter which the law gives him the power and imposes upon him the duty to decide for himself. (*Riverside Oil Co.* v. *Hitchcock*, *supra*.)

It is submitted that the judgment of the court below should be affirmed.

JOHN W. DAVIS,
Solicitor General.
MORGAN H. BEACH,
Attorney

NOVEMBER, 1913.

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UNITED STATES EX REL. GOLDBERG *v.* DANIELS, SECRETARY OF THE NAVY.

ERROR TO THE COURT OF APPEALS OF THE DISTRICT OF COLUMBIA.

No. 79. Argued November 14, 1913.—Decided December 1, 1913.

The United States, as the owner in possession of property, cannot be interfered with behind its back; nor can the courts compel the officer having the custody of such property to surrender it in a proceeding to which the United States is not, and cannot be made, a party.

Mandamus will not lie at the instance of one who in response to advertisement has made the highest bid for a vessel to compel the Secretary of the Navy to deliver the vessel.

The discretion of the Secretary of the Navy is not ended by receipt and opening of bids for a condemned naval vessel even though they

satisfy the conditions prescribed. Mandamus will not lie to compel him to accept the highest bid.

37 App. D. C. 282, affirmed.

THE facts, which involve the jurisdiction of the court to issue a writ of mandamus directing the Secretary of the Navy to carry out the terms of a bid in response to advertisements for sale of a naval vessel, are stated in the opinion.

Mr. Albert N. Eastman and *Mr. Charles Poe* for plaintiff in error:

There was a binding contract for the sale of the cruiser to the relator.

The relator had carried out and performed everything which was to be done by him. He had paid the full purchase price. The minute the bids were opened and his proposal or bid was ascertained to be the highest and the money was paid, the statute required that the net proceeds of the sale should be covered into the Treasury, and the vessel be delivered to the purchaser, who could not have withdrawn his bid or retracted his offer after the sealed bids had been opened. As he was bound, under no principle of law, was the Secretary of the Navy released?

The case cannot be likened to a sale at public auction. *Blossom* v. *Railroad Co.*, 3 Wall. 196, 206, does not apply.

This court has determined that no government property can be sold under statutes similar to the one in question except in the way prescribed by law. *Steele* v. *United States*, 113 U. S. 128.

Instead of likening this transaction to an auction sale, it should be likened to a sale by correspondence. *Taylor* v. *Insurance Co.*, 9 How. 390; Benjamin on Sales, 7th ed., Bennett's Notes, p. 54, § 44; also p. 68, § 64; see also the American note on p. 76 of the same work.

No right to reject bids was reserved, and under the statute no right to reject bids could have been reserved.

Integrity of the Government demands it deliver this cruiser. If the Government does not make delivery, can it ever expect honest bids when it thus advertises? If the Government can thus refuse, equally so can the individual when the sealed bids are opened and he finds he has been foolish in bidding too much, or for other personal reasons of his own he desires to change his mind.

As the Secretary could only sell in this manner, the relator had a perfect right to rely on his rights under the statute and the Secretary cannot take advantage of a concealed purpose.

This is not such a contract as cannot be enforced for failure to comply with § 3744, Rev. Stat., as that section does not apply, and even if applicable before performance, as the contract has been performed § 3744 would not apply. *St. Louis Hay & Grain Co.* v. *United States*, 191 U. S. 159; *Garfield* v. *United States*, 93 U. S. 242.

The statute of frauds cannot be pleaded to an executed contract. *Cleveland, C., C. & St. L. Ry. Co.* v. *Wood*, 189 Illinois, 352, 355.

Section 3744 was passed in 1862 as a general act. Section 5 in 1883 as a special act to govern the sale of vessels, and, therefore, as the special statute is later, it will be regarded as an exception to, or qualification of, the prior general one. 36 Cyc. 1151. See also 1 Fed. Stat. Ann.

Mandamus is the appropriate remedy to compel its performance. No discretion was left to the Secretary of the Navy under § 5.

In *Knight* v. *Lane*, 228 U. S. 6, the writ was refused because the court held that the Secretary of the Interior had a discretion in the matter involved in that proceeding. In *Parish* v. *MacVeagh*, 214 U. S. 124, the court granted the writ against the Secretary of the Treasury because it held

that there was simply a ministerial function to be performed. See also *Garfield* v. *Goldsby*, 211 U. S. 249.

Mr. Morgan H. Beach, with whom *Mr. Solicitor General Davis* was on the brief, for defendant in error.

MR. JUSTICE HOLMES delivered the opinion of the court.

This is a petition for a mandamus directing the Secretary of the Navy to deliver the United States Cruiser Boston to the petitioner. The petition alleges that after survey, condemnation and appraisal the Cruiser was stricken from the Naval Register under the act of August 5, 1882, c. 391, § 2, 22 Stat. 284, 296; that thereafter the Secretary of the Navy advertised for proposals of purchase under the act of March 3, 1883, c. 141, 22 Stat. 582, 599; that the petitioner bid more than the appraised value, sending a certified check for the whole sum bid; that when the bids were opened on the day fixed the petitioner's was the highest, but that the Secretary refused to deliver the vessel and sent back the check, which the petitioner holds subject to the Secretary's order. The answer admits the facts, but sets up that the bid is not an acceptance of an offer, but is itself only an offer, subject to be accepted or not at the discretion of the Secretary and that the Secretary never accepted the petitioner's bid, the Government having decided to lend the Cruiser to the Governor of Oregon for use by the Naval Militia of that State. The petitioner demurred, but the petition was dismissed on the ground that the discretion of the Secretary was not ended by the receipt and opening of the bids, even though they satisfied all the conditions prescribed. 37 App. D. C. 282; *Sub nom. United States* v. *Meyer*.

We see no sufficient reason for throwing doubt upon this premise for the decision, but there is another that comes earlier in point of logic. The United States is the

owner in possession of the vessel. It cannot be interfered with behind its back and, as it cannot be made a party, this suit must fail. *Belknap* v. *Schild*, 161 U. S. 10. *International Postal Supply Co.* v. *Bruce*, 194 U. S. 601, 606. *Oregon* v. *Hitchcock*, 202 U. S. 60, 69. *Naganab* v. *Hitchcock*, 202 U. S. 473, 476.

Judgment affirmed.